

**Before the
Federal Communications Commission
Washington, D.C. 20554**

| | | |
|---|---|--------------------------|
| In the Matter of |) | |
| |) | |
| ACME Television Licenses of Madison, LLC |) | Facility I.D. No. 26025 |
| |) | NAL/Acct. No. 0741420006 |
| Licensee of Station WBUW(TV) |) | FRN: 0008327744 |
| Janesville, Wisconsin |) | |

FORFEITURE ORDER

Adopted: May 19, 2010

Released: May 20, 2010

By the Chief, Video Division, Media Bureau:

I. INTRODUCTION

1. In this Forfeiture Order (“Order”) we issue a monetary forfeiture in the amount of eight thousand dollars (\$8,000) to ACME Television Licenses of Madison, LLC (“Licensee”), licensee of Station WBUW(TV), Janesville, Wisconsin (“Station”), for its willful and repeated violation of Section 73.670 of the Commission’s Rules, by exceeding the commercial limitations in children’s programming.¹

II. BACKGROUND

2. On August 1, 2005, Licensee filed an application to renew the license of the Station (the “Application”) (File No. BRCT-20050801AVQ). Section IV, Question 5 of the license renewal application form, FCC Form 303-S, requests that the licensee certify that it complied with the limitations on commercial matter in children’s programming specified in Section 73.670 of the Rules. In Exhibit 19, Licensee indicated that, between September 24, 2002, and December 14, 2003, the Station exceeded the children’s television commercial limits on 22 occasions. Of these overages, one was 15 seconds in duration, 19 were 30 seconds in duration, and one was one minute and 30 seconds in duration. Licensee attributed the 15-second and 30-second overages to its failure to correctly format the commercial breaks during children’s programming. Licensee maintained that measures have been implemented that require a station employee “to verify that the program format templates in the traffic and billing system for children’s programs do not exceed the commercial time limits in the future.” With respect to the one minute and 30 second overage, Licensee claimed that it occurred when the facility that assembles commercial content into all WB Network programming and provides the uplink services for dissemination to the station incorrectly inserted commercial content into a children’s program.

3. Licensee stated that the remaining incident occurred on September 24, 2002, when the Station aired a WB Television Network commercial for the Gameboy Advance E-Reader, during the “Pokemon” program. According to Licensee’s description, the commercial contained “fleeting partial images of three Pokemon game cards” displayed as three cards within a six-card fan arrangement. Licensee stated that the partially hidden “Pokemon” cards were visible for approximately 1.04 seconds and that “Pokemon” was not mentioned in the audio of the commercial. In addition, Licensee stated that only the letters “MON” were visible and that no “Pokemon” characters were discernible. Licensee asserted that this incident differs from the instances in which the Commission has concluded that a program constitutes a program-length commercial. Specifically, Licensee argued that in previous cases,

¹ 47 C.F.R. § 73.670.

the commercials depicted characters for a longer period of time than the “Pokemon” game cards were shown in this case. Therefore, Licensee contended, the characters in prior cases were more recognizable than the “Pokemon” cards in this case. Licensee also indicated that the “Pokemon” episode in which the Gameboy Advance E-Reader commercial appeared did not contain any “Pokemon” game cards. Licensee argued that, since no “Pokemon” characters were discernible and only the letters “MON” were visible, children would not perceive any linkage between the “Pokemon” program and the Gameboy Advance E-Reader commercial. Thus, Licensee asserted that this incident does not constitute a program-length commercial.

4. On April 30, 2007, the Bureau issued a Notice of Apparent Liability for Forfeiture (“NAL”) in the amount of \$8,000 to Licensee for its violations.² In response to the NAL, Licensee filed a letter (“Letter”) on May 30, 2007, and a Supplemental Response (“Supplement”) on June 30, 2008. In its Letter, Licensee requested reduction of the proposed forfeiture due to the “Station’s financial hardship and its corresponding inability to pay.”

5. In its Supplement, Licensee stated that the Station is currently an affiliate of The CW Network and a former affiliate of The WB Television Network. Licensee referenced a Letter filed in response to a Notice of Apparent Liability issued against San Antonio (KRRT-TV) Licensee, Inc.,³ and requested that if the Bureau determines that the “Pokemon” program was not a program-length commercial and/or reduces the proposed forfeiture in the San Antonio proceeding, that the Bureau reverse its finding in the NAL that “Pokemon” program constituted a program-length commercial and/or reduce the proposed forfeiture in the instant proceeding.

III. DISCUSSION

6. The forfeiture amount proposed in this case was assessed in accordance with Section 503(b) of the Act,⁴ Section 1.80 of the Rules,⁵ and the Commission’s *Forfeiture Policy Statement*.⁶ In assessing forfeitures, Section 503(b)(2)(D) of the Act requires that we taken into account the nature, circumstances, extent, and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and such other matters as justice may require.⁷

7. Licensee requested that if the Bureau finds in the San Antonio proceeding that the “Pokemon” program was not a program-length commercial, and reduces the proposed forfeiture in the San Antonio proceeding, that the Bureau reverse its finding in the NAL that “Pokemon” program was a program-length commercial and/or reduce the proposed forfeiture in the instant case. In the San Antonio proceeding, the Bureau affirmed its finding that the “Pokemon” program constituted a program-length commercial, and concluded that reduction or cancellation of the proposed forfeiture was not warranted.⁸ Thus, we dismiss as moot Licensee’s request to reverse our finding regarding the “Pokemon” program in this case and/or reduce the proposed forfeiture accordingly.

8. Licensee further asserted that the proposed forfeiture should be reduced in light of the

² See *ACME Television Licenses of Madison, LLC*, 22 FCC Rcd 8243 (MB 2007).

³ *San Antonio (KRRT-TV) Licensee, Inc., (KMYS(TV))*, 22 FCC Rcd 10690 (MB 2007).

⁴ 47 U.S.C. § 503(b).

⁵ 47 C.F.R. § 1.80.

⁶ *The Commission’s Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*, Report and Order, 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999).

⁷ 47 U.S.C. § 503(b)(2)(D).

⁸ *San Antonio (KRRT-TV) Licensee, Inc.*, DA 10-658, (rel. April 21, 2010).

Station's financial hardship. The Commission will not consider reducing or canceling a forfeiture in response to a claim of inability to pay unless the party against which the forfeiture is proposed submits: (1) federal tax returns for the most recent three-year period; (2) financial statements prepared according to generally accepted accounting principles ("GAAP"); or (3) some other reliable and objective documentation that accurately reflect the licensee's current financial status. Any claim of inability to pay must specifically identify the basis for the claim by reference to the financial documentation submitted.⁹

9. In general a licensee's gross revenues are the best indicator of its ability to pay a forfeiture.¹⁰ The Commission has found that the staff's use of gross revenues is a reasonable and useful yardstick to analyze a company's financial condition for forfeiture purposes.¹¹ In support of its request for cancellation or reduction of the forfeiture, Licensee submitted copies of its financial statements for the years 2005 and 2006, which it claimed were prepared according to generally accepted accounting principles.¹² Based on Licensee's financial documentation, we do not believe that it has demonstrated that the forfeiture amount is excessive and the Licensee cannot pay it.¹³

10. We have considered Licensee's response to the NAL in light of the above statutory factors, our Rules, and the *Forfeiture Policy Statement*. We conclude that Licensee willfully¹⁴ and repeatedly¹⁵ violated Section 73.670 of the Rules, and that no mitigating circumstances warrant cancellation or reduction of the proposed forfeiture amount assessed against WBW(TV).

IV. ORDERING CLAUSES

11. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Communications Act of 1934, as amended, and Sections 0.283 and 1.80 of the Commission's Rules,¹⁶ that ACME Television Licenses of Madison, LLC, SHALL FORFEIT to the United States the sum of \$8,000 for willfully and repeatedly violating Section 73.670 of the Commission's Rules.

⁹ See *Discussion Radio, Inc.*, Memorandum Opinion and Order, 19 FCC Rcd 7433, 7441 (2004).

¹⁰ See *PJB Communications of Virginia, Inc.*, Memorandum Opinion and Order, 7 FCC Rcd 2088, 2089 (1992) ("*PJB Communications*").

¹¹ *Id.*

¹² Licensee has asked for confidential treatment of all of its financial statements pursuant to 47 C.F.R. § 0.459.

¹³ The forfeiture amount in this case is well within the range of percentage of violator's gross revenues in prior cases. See *PJB Communications*, 7 FCC Rcd at 2089 (forfeiture not deemed excessive where it represented approximately 2.02 percent of the violator's gross revenues); *Hoosier Broadcasting Corporation*, Memorandum Opinion and Order, 15 FCC Rcd 8640, 8641 (EB 2002) (forfeiture not deemed excessive where it represented approximately 7.6 percent of the violator's gross revenues); *Afton Communications Corporation*, Memorandum Opinion and Order, 7 FCC Rcd 6741 (CCB 1992) (forfeiture not deemed excessive where it represented approximately 3.9 percent of the violator's gross revenues).

¹⁴ Section 312(f)(1) of the Act defines "willful" as "the conscious and deliberate commission or omission of [any] act, irrespective of any intent to violate" the law. 47 U.S.C. § 312(f)(1). The legislative history of Section 312(f)(1) of the Act clarifies that this definition of willful applies to Sections 312 and 503(b) of the Act, H.R. REP. NO. 97-765, 51 (Conf. Rep.), and the Commission has so interpreted the terms in the Section 503(b) context. See *Southern California Broadcasting Co.*, Memorandum Opinion and Order, 6 FCC Rcd 4387-88 (1991), *recon. denied*, 7 FCC Rcd 3453 (1992) ("*Southern California*").

¹⁵ Section 312(f)(1) of the Act defines "repeated" as "the commission or omission of [any] act more than once or, if such commission or omission is continuous, for more than one day." 47 U.S.C. § 312(f)(1). See also *Southern California*, 6 FCC Rcd at 4388 (applying this definition of repeated to Sections 312 and 503(b) of the Act).

¹⁶ 47 U.S.C. § 503(b); 47 C.F.R. §§ 0.283, 1.80.

12. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Commission's Rules within 30 days of the release of this Forfeiture Order. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.¹⁷ Payment of the proposed forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced in the caption above. Payment by check or money order may be mailed to Federal Communications Commission, at P.O. Box 979088, St. Louis, MO 63197-9000. Payment by overnight mail may be sent to U.S. Bank—Government Lockbox #979088, SL-MO-C2-GL, 1005 Convention Plaza, St. Louis, MO 63101. Payment by wire transfer may be made to ABA Number 021030004, receiving bank: TREAS NYC, BNF: FCC/ACV--27000001 and account number as expressed on the remittance instrument. If completing the FCC Form 159, enter the NAL/Account number in block number 23A (call sign/other ID), and enter the letters "FORF" in block number 24A (payment type code).

13. Requests for full payment of the forfeiture proposed in this *NAL* under the installment plan should be sent to: Associate Managing Director- Financial Operations, 445 12th Street, S.W., Room 1-A625, Washington, D.C. 20554.¹⁸

14. IT IS FURTHER ORDERED that copies of this Forfeiture Order shall be sent, by First Class and Certified Mail, Return Receipt Requested, to ACME Television Licenses of Madison, LLC, 2101 East Fourth Street, Suite 202, Santa Ana, California 92705, and to Andrew S. Kersting, Esquire, Dickstein Shapiro LLP, 1825 Eye Street, N.W., Washington, D.C. 20006-5403.

FEDERAL COMMUNICATIONS COMMISSION

Barbara A. Kreisman
Chief, Video Division
Media Bureau

¹⁷ 47 U.S.C. § 504(a).

¹⁸ See 47 C.F.R. § 1.1914.